In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 126

STANLEY M. UNGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals are reported at 357 F. 2d 91.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966. A petition for rehearing *en banc* was denied on March 14, 1966. On March 22, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 11, 1966, and the petition was filed on May 10. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under 29 U.S.C. 186 (which makes it a crime for employers to make payments to repre-

sentatives of their employees), the question of whether the employees represented by the accused are in an industry affecting commerce is an issue of law for the court.

2. Whether the evidence was sufficient to establish that the employers of the employees whom petitioner represented were in an industry affecting commerce.

STATUTES INVOLVED

29 U.S.C. 186 provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
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> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
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> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

29 U.S.C. 142 provides in pertinent part:

When used in this chapter—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

* * * * *

29 U.S.C. 152 provides in pertinent part:

When used in this subchapter—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of three counts charging that he unlawfully accepted sums of money from employers of the employees he represented, in violation of 29 U.S.C. 186.[1] He was sentenced to concurrent terms of imprisonment for one year on each count. The court of appeals affirmed. 357 F.2d 91.

1. The evidence showed that petitioner was the secretary-treasurer of Local 32–E, Building Service Employees International Union (R. 38a),[2] which represents superintendents in apartment buildings with more than 30 units located in Bronx and Westchester Counties, New York, and also employees of Yonkers Raceway and of a department store (R. 34a–35a). On April 19, 1961, and again on May 7, 1962,

[1] Petitioner was named on six counts of a 23-count indictment. At the commencement of trial one count was dismissed on petitioner's motion with the consent of the government. The jury disagreed on two other counts. The petition for certiorari of co-defendant Vincent J. Ricciardi, who was separately tried and convicted on 15 counts, was denied on May 16, 1966 (No. 1171).

[2] References are to Volume 2 of the three-volume record of trial, on file with the Clerk of this Court.

petitioner borrowed a total of $5,000 from Jerome Jakubovitz, a part owner of several apartment buildings in Bronx, New York, whose employees were represented by petitioner's union (R. 57a–60a). In December 1963, petitioner was at the office of Zachary Fieber, another real estate owner who had negotiated collective bargaining contracts with petitioner's union (R. 74a). Fieber gave petitioner several envelopes containing a total of $200 in cash, and asked petitioner to distribute them to certain named employees in the union office as Christmas gifts (R. 75a–77a). One envelope containing $50 was a gift to petitioner (R. 78a).

Petitioner admitted obtaining the loans from Jakubovitz, but alleged that they were merely transactions between friends, and were repaid within a short time (R. 117a–118a). With regard to the money received from Fieber, petitioner stated that he merely distributed the gifts to the employees as directed, and that the envelope bearing his name was given to him with the understanding that he would distribute it to other union office employees whom Feiber did not know by name, and in any other manner in which he deemed it would do the most good (Tr. 121a).

2. In his final instructions to the jury, the trial court noted that the offenses charged contained four elements, each of which had to be established by the government beyond a reasonable doubt. The fourth element was that "the employees were employed in an industry affecting commerce between the states" (R. 150a). The judge told the jury that the government's contention was that the employees of the employers

were in an industry affecting commerce "because all of the landlords who have contracts with Local 32–E to a very large extent use oil for heating of their apartment houses, which oil comes from places outside the State of New York, and because the employers who own or operate the Yonkers Raceway cause horses to be transported from states outside the State of New York, and because the department store, Klein's, deals in goods that come from many, many places". (R. 150a–151a). The judge stated that petitioner's position on the commerce issue was that the landlords named in the indictment had no employees engaged in interstate commerce, and that their business was purely local (R. 151a), but he instructed the jury that petitioner's position was incorrect, the proper test being "whether the employers of all the employees in the union are in an industry affecting interstate commerce" (R. 151a).

In affirming the conviction, the court of appeals ruled that the test applied by the district court was too broad, but that the error in the judge's charge was not prejudicial because the undisputed evidence established jurisdiction under the statute as a matter of law.

ARGUMENT

1. Petitioner contends that the court of appeals erred in ruling that the issue whether the employees whom petitioner represented were in an industry affecting interstate commerce was a question of law for the court, his theory (Pet. 21–30) being (1) that this Court so held in *Stirone* v. *United States*, 361 U.S. 212, a case arising under the Hobbs Act, 18

U.S.C. 1951, which makes it a crime to obstruct commerce by robbery or extortion, and (2) that such ruling is equally applicable to the Taft Hartley Act. Actually, all *Stirone* held was that it was improper for the trial judge to submit a theory of obstruction of commerce that had not been charged in the indictment, thereby undermining the function of the grand jury. No such issue is presented here.

In addition, the Hobbs Act and the Taft Hartley Act involve different kinds of interstate commerce issue. Under the Hobbs Act, the crime itself is the obstruction of commerce; effect on commerce is thus of the essence of the criminal conduct. But under the Taft Hartley Act involved here, effect on commerce is no part of the condemned act. What is condemned is the receipt of money from an employer by representatives of employees, and the requirement that the employees be in an industry affecting commerce serves merely to confine the application of the prohibition within the constitutional limits of federal jurisdiction. Hence, like the issue of materiality or pertinency in perjury or contempt cases, the issue of effect on commerce under 29 U.S.C. 186 is one of law for the courts.[3]

In other words, whether an issue is one for the jury or for the court depends not on whether it is an

[3] See *Braden* v. *United States*, 365 U.S. 431, 435–437; *Sinclair* v. *United States*, 279 U.S. 263, 298–299; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7), certiorari denied, 355 U.S. 836; *Brooks* v. *United States*, 253 F. 2d 362 (C.A. 5), certiorari denied, 357 U.S. 927; *Brown* v. *United States*, 334 F. 2d 488 (C.A. 9), affirmed, 381 U.S. 437.

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element of the offense, but on the nature of the issue (see cases cited in note 3, *supra*): Clearly, Congress intended that the payment of money by an employer to any representative of his employees be outlawed, so long as such payment has sufficient relation to interstate commerce to be subject to federal criminal jurisdiction. Like pertinency or materiality, the issue of commerce here in no sense characterizes the prohibited act; it merely delineates the class of cases to which the federal statute applies.[4]

2. Petitioner was secretary-treasurer of a union that represented building superintendents in 5500 houses in Bronx and Westchester Counties, New York, each with 30 apartment units or more; the duties of the superintendents included the servicing of heat. All the fuel used in the dwellings originated outside the State (Exh. 27 (Stipulation) R. 182a). On the basis of these undisputed facts, the court of appeals held that it could take judicial notice that the amount of fuel used in 5,500 apartment buildings was substantial, and that a slow-down or strike by the superintendents who run the heating systems would affect the amount of fuel used in the buildings in a significant way (Pet. App. 10a–11a). This was plainly sufficient to establish that the employees whom petitioner represented were in an industry affecting commerce as that term is defined in 29 U.S.C. 142, *i.e.*,

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[4] *United States* v. *Gollin*, 166 F. 2d 123 (C.A. 3), certiorari denied, 333 U.S. 875, cited by petitioner (Pet. 30) holds only that, when the issue, unlike here, is one that would normally go to the jury, the judge cannot take it from the jury even if the evidence is undisputed.

an industry in which a labor dispute would tend to burden or obstruct commerce or the free flow of commerce, See *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224; see also *National Labor Relations Board* v. *Benton & Co., Inc.*, 313 F. 2d 629 (C.A. 5); *National Labor Relations Board* v. *Fiore Brothers Oil Co.*, 317 F. 2d 710 (C.A. 2); *Kingsbury Electric Cooperative, Inc.* v. *National Labor Relations Board*, 319 F. 2d 387 (C.A. 8); *National Labor Relations Board* v. *Cross*, 346 F. 2d 165 (C.A. 4), certiorari denied, 382 U.S. 918; *National Labor Relations Board* v. *Inglewood Park Cemetery Assn.*, 355 F. 2d 448 (C.A. 9).[5]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JULY 1966.

[5] Since the facts which support the conclusion of the court of appeals were presented at the trial and could have been but were not contested, the court of appeals, in drawing conclusions from the facts, did not, as petitioner claims (Pet. 35–40), deprive him of the right of confrontation.

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